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No. 08-551

IN THE

Supreme Court of the United States

GERALD J. BRANKER, Warden,

Petitioner,

vs.

WILLIAM ROBERT GRAY, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state court's finding that petitioner's expert was not credible a determination of fact entitled to deference under 28 U. S. C. § 2254(d)(2), and is that decision reasonable when the factual basis of the expert's opinion regarding mental state at the time of the crime is inadequate and contradicted by other evidence?

2. Can a defendant who is able to and does retain counsel, and who refuses to pay for mental health expert assistance, subsequently claim ineffective assistance of counsel for failure to retain and employ such an expert?

3. Was the state court decision rejecting the ineffective assistance claim described in Questions 1 and 2 an unreasonable application of clearly established federal law for the purpose of 28 U. S. C. § 2254(d)(1)?

4. Should the rule of *Cuyler* v. *Sullivan*, that ineffective assistance claims are judged in the same way whether counsel is chosen by the state (appointed) or by the defendant (retained), be reconsidered?

5. Did the Fourth Circuit Court of Appeals misread the state court opinion regarding the *Strickland* standard in the same way that this Court found was reversible error in *Woodford* v. *Visciotti*?

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Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent. Both counsel received timely notice of the intent to file this brief.

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

INTEREST OF *AMICUS CURIAE*

The decision of the Court of Appeals in this case weakens the protections of the Antiterrorism and Effective Death Penalty Act of 1996 by contradicting reasonable findings of facts made by the state court. In addition, the Court of Appeals has set aside a final judgment of the state court because of voluntary, informed choices made by the defendant himself, not because of any deficit in the procedures provided by the state. This decision is contrary to the interests CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

November, 2008

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Court of Appeals in this case committed exactly the same error as in *Woodford* v. *Visciotti*. Even though the state court stated the correct standard for ineffective assistance multiple times, including the conclusion, the Court of Appeals lifted one sentence out of context to claim that the state court applied the wrong standard.

This case involves issues of the interaction of state-court factual findings with the state court's application of the law to those facts that have not yet been fully explored under AEDPA. If the state court's findings of fact are reasonable under 28 U. S. C. § 2254(d)(2), then the determination of whether its application of clearly established law was reasonable under § 2254(d)(1) should be made with reference to those findings, not the federal court's contrary findings.

The rule of *Cuyler* v. *Sullivan*, that the effectiveness of retained counsel should be judged in the same way as the effectiveness of appointed counsel, should be reconsidered. Indigent and nonindigent defendants are not similarly situated. The nonindigent defendant has full control over the choice of counsel, and the state has almost none. The party with control should bear the responsibility for a poor choice.

More generally, defendants should be responsible for all of their personal choices. When a defendant with means initially refuses to pay for experts and then intentionally divests himself of assets, the State should not have to fund the defense that defendant refused to fund, and its judgment should be not set aside because of a situation defendant personally chose to create.

ARGUMENT

Claims of ineffective assistance of counsel are now made in nearly every capital habeas case, regardless of the actual quality of representation. While the merits of the claim are simply the application of settled law to particular facts, review of these claims on federal habeas corpus after the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) involves a number of recurring issues of law, many of which have not been resolved. Because they occur in the most important of criminal cases—the maximum penalty for maximum crimes—they are worthy of resolution by this Court. This case involves several such questions, plus one patent violation of precedent on an issue that has been settled by this Court.

A. Visciotti Error.

Quoting a single sentence of the state court opinion out of context, the Court of Appeals concluded, "The MAR court required *certainty* that the jury would have reached a different result at sentencing." App. to Pet. for Cert. 28a. Read fairly and as a whole, the state court opinion is clear that the judge understood and applied the correct standard. See App. to Pet. for Cert. 128a-132a, 134a, 152a-153a. Indeed, the very next sentence after the one quoted by the Court of Appeals applies the correct "reasonable probability" test to the bottom line, *i.e.*, whether "the result of defendant's trial would have been any different." App. to Pet. for Cert. 158a.

Ironically, the paragraph in which the Court of Appeals so badly misconstrues the state court opinion ends with a citation to *Woodford* v. *Visciotti*, 537 U. S. 19, 22-24 (2002). See App. to Pet. for Cert. 28a. That case, on those pages, is "on all fours" for the proposition that reading the state court opinion the way the Court of Appeals did is reversible error. The state court opinion in that case, as in this one, stated the correct test multiple times. Seizing upon a few isolated passages in which the full test was not repeated, the federal court in *Visciotti* found the state court opinion was contrary to clearly established federal law. "This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. [Citations.] It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' [citation], which demands that state-court decisions be given the benefit of the doubt." *Visciotti*, *supra*, at 24.

The *Visciotti* error alone would be sufficient to summarily reverse the Court of Appeals' decision in the present case, as this Court did in *Visciotti*. See *id.*, at

27. Other issues, however, warrant taking the case for full briefing and argument.

B. 28 U. S. C. § 2254(d)(2).

After Congress enacted 28 U. S. C. § 2254(d) in AEDPA, most of the attention was focused on paragraph (1), regarding state-court decisions on questions of federal law and application of law to fact. This was a major change from the prior rule of independent review. See *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000). Paragraph (2), relating to state-court determinations of fact, was not so large a change from pre-AEDPA law. See *Thompson* v. *Keohane*, 516 U. S. 99, 107-110 (1995) (discussing former subsection (d)).

As this case illustrates, the line between fact and application tends to blur when the ultimate fact is as nebulous as whether mitigating factors outweigh aggravating ones. Additional fog is generated when the supporting fact at issue is not an objective one—such as the defendant's age or whether he was the trigger-man—but instead is the nebulous concept of "personality disorder." "[T]he proper characterization of a question as one of fact or law is sometimes slippery." *Id.*, at 110-111.

In the present case, a witness testified at a hearing, and the finder of fact decided he was not credible. Determinations of credibility have generally been accorded the strongest deference. See *id.*, at 111. However, the bottom-line conclusion of whether ineffectiveness resulted in prejudice is an issue of law. See *ibid.* (citing *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984)).

The relationship between fact determinations and the application of law to those facts has not been explored by this Court since AEDPA. The state court's

finding that the expert testimony was not credible was a determination of fact under § 2254(d)(2). If the federal court finds that determination reasonable, it need not second-guess whether it was correct. See *Williams*, 529 U. S., at 412 (construing same word in paragraph (1)). Under paragraph (1), then, the question should be whether the state court reasonably applied the law to the facts as the state court reasonably found them, not as the federal court may find them.

Because trial counsel generally do introduce evidence that is both strongly mitigating and solidly supported, habeas counsel grasping at straws will often claim left-out mitigation that is either weakly mitigating or weakly supported as a matter of fact. *Bell* v. *Kelly*, No. 07-1223, dismissed as improvidently granted on November 17, had both types. Bell's evidence of good relationships with the multiple women who had borne his children was entitled to little weight, while his claim to have been abused as a child was simply unsubstantiated as a matter of fact. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 8-9.

The evidence in this case is weak on both grounds. The state court was unimpressed with the expert's testimony in relation to the other evidence available. See App. to Pet. for Cert. 153a-157a. Further, even if the expert's diagnosis of Paranoid Personality Disorder, App. to Pet. for Cert. 153a, was believed, reasonable people can disagree as to how much weight, if any, such a diagnosis should have. The Court of Appeals' opinion proclaims this diagnosis as a "severe mental illness." See App. to Pet. for Cert. 31a. Whether Axis II personality disorders are mental illnesses at all is a question reasonable people can and do differ on, see *Kansas* v. *Hendricks*, 521 U. S. 346, 375 (1997) (Breyer, J.,

dissenting), and a belief that they are simply not mitigating is a reasonable one. See *Graham* v. *Collins*, 506 U. S. 461, 499-500 (1993) (Thomas, J., concurring).

The interaction between the facts supporting omitted factors in mitigation, the determination of whether the omission was prejudicial, and the deference due state-court determinations of both is an important and recurring issue. It warrants this Court's attention.

C. Effectiveness of Retained Counsel.

Cuyler v. *Sullivan*, 446 U. S. 335, 344-345 (1980), rejected an argument that ineffectiveness claims should be handled differently when counsel is retained rather than appointed. The Court said, "we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who cannot choose their own lawyers." *Ibid.* (footnote omitted).

Of course, the law should not deny equal justice. However, equal justice does not always mean equal treatment. Equal treatment is required only for persons similarly situated. See, *e.g.*, *United States* v. *Bass*, 536 U. S. 862, 863-864 (2002) (*per curiam*). An important factor in whether the government must protect someone's interest is whether he is capable of protecting his own. The government must provide health care to persons in prison because it has deprived them of the ability to obtain their own. It has no affirmative obligation to provide health care for others. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 199-200 (1989). A person who retains counsel has a right to counsel of his choice with few limits. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 144 (2006). The indigent who is appointed counsel has no such right. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624 (1989).

When the government controls the choice, it logically should have greater responsibility for the consequences.

Conversely, when the defendant has complete control over the choice and the State has none, there is something fundamentally unfair in holding the State responsible for the consequences. The Court of Appeals noted with a disapproving tone that lead defense counsel had previously tried no capital cases and only one first-degree murder case. App. to Pet. for Cert. 6a. The attorney was selected by Gray, not the State of North Carolina. To say that Gray's unreviewable choice of counsel gives him a weapon to attack the State's judgment against him sounds like something out of Alice in Wonderland. The people are also entitled to fundamental fairness. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934).

Cuyler was decided at a time when ineffective assistance claims based on counsel's performance were a far lesser burden on the system of justice than they are today. Nine years after *Cuyler*, respected commentators could write, "the decisions uniformly reject these attacks on judgments of conviction." 5 B. Witkin & N. Epstein, California Criminal Law § 2772, p. 3356 (2d ed. 1989). The current edition does not say that. 5 B. Witkin & N. Epstein, California Criminal Law, Criminal Trial §§ 199-200, 204, pp. 311-313, 320-321 (3d ed. 2000).

Cuyler is ripe for reconsideration.

D. Effective Assistance and Personal Responsibility.

The classic exposition of the importance of the right to assistance of counsel, *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932), emphasizes the need for counsel to do what the defendant is incapable of doing for himself. Although the founding generation quite properly

rejected the common law rule that the defendant must stand alone without counsel, a right to assistance cannot be read to absolve the defendant from all responsibility for the conduct of his own defense. When a mentally competent, adult defendant puts on a defense that is less effective than it might have been as a result of his *own* decisions, the State has not violated any constitutional right.

A defendant can plead guilty, thereby waiving all his trial rights. See, *e.g.*, *North Carolina* v. *Alford*, 400 U. S. 25, 37-39 (1970). He can waive the right to counsel and proceed *pro se*, even when that choice is foolish, and if he does so he has no Sixth Amendment claim for the ineffectiveness of his self-representation. See *Faretta* v. *California*, 422 U. S. 806, 834-835, n. 46 (1975). In a capital case, the defendant can forbid the presentation of any mitigating evidence, and again he has no Sixth Amendment claim from counsel's failure to do what he has chosen to forbid. See *Schriro* v. *Landrigan*, 550 U. S. 465, 127 S. Ct. 1933, 1942, 167 L. Ed. 2d 836, 846-847 (2007).

In the present case, Gray personally made two decisions relevant to the presentation of mental health expert testimony. Early in the proceedings, he told counsel in emphatic terms that he would not authorize any expenditure whatever for such expert assistance. See App. to Pet. for Cert. 8a. Later, he rendered himself financially unable to hire such assistance by transferring his assets to an irrevocable trust. App. to Pet. for Cert. 9a.

Under *Ake* v. *Oklahoma*, 470 U. S. 68, 70 (1985), "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." For now, we will

assume for the sake of argument that the *Ake* rule extends beyond sanity to "personality disorders" that some people might consider mitigating. *Ake* does not address whether its rule extends to the defendant who has intentionally inflicted indigence on himself, as Gray did.

While the particular fact pattern here is unusual, the principle is important and variations on the theme are common. Can a defendant attack a judgment against him because of an event that was entirely within his ability to prevent? In *Florida* v. *Nixon*, 543 U. S. 175, 181-182 (2004), defense counsel informed defendant what he planned to do, and all the defendant had to do was say "no." In *Landrigan*, *supra*, the defendant actively opposed counsel's efforts. In both cases, the Sixth Amendment claim was rejected. On the other hand, in *Rompilla* v. *Beard*, 545 U. S. 374, 381-383 (2005), the trial attorneys were found ineffective for not discovering information about the defendant's bad childhood after the defendant lied to them and told them his childhood was normal. See also *id.*, at 398, 401 (Kennedy, J., dissenting); *Rompilla* v. *Horn*, 355 F. 3d 233, 251-252 (CA3 2004).

The time has come, *amicus* submits, to address this issue head-on. While the defendant is entitled to the *assistance* of counsel for matters beyond his ability, the defendant himself is responsible for the consequences of his own decisions when those decisions are within his capacity. The Sixth Amendment should not be extended to shield the defendant from self-inflicted wounds in the absence of mental incapacity to make the decision in question.

CONCLUSION

The petition for writ of certiorari should be granted.

November, 2008

Respectfully submitted,

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